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Ethics in an Echo Chamber: Legal Ethics & the Peremptory Challenge

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RECENT DEVELOPMENT

Kayley A. Viteo*

Ethics in an Echo Chamber:
Legal Ethics & the Peremptory Challenge

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* Kayley Viteo is a St. Mary’s University School of Law, J.D. 2021 Candidate. The author would like to express her sincere gratitude to Professor Donna Coltharp for her guidance, editing, and continued mentorship and support. The author would also like to thank Hannah Mery for preparing this Recent Development for publication. Most importantly, this author would like to express that this Recent Development would not exist without the tireless commitment of persons of color. We can, and must, always be better. This author writes from a place of undeniable privilege in the hope that her voice may lend itself to a chorus working for change so persons of color do not have to fight for their voices to be heard.

I. INTRODUCTION

An attorney makes a peremptory challenge when, without needing to provide a reason, she “request[s] that a judge disqualify a potential juror.”¹ Though its history is tied to the defendant’s right to a fair trial,² prosecutors may now make peremptory strikes in all fifty states.³ Perhaps unsurprisingly, this new prosecutorial right resulted in extraordinarily racist applications in the mid-nineteenth century, as jury panels became more diverse and minorities gained more rights, including the right to vote.⁴ Prosecutors, in particular, used the peremptory challenge to prevent African-Americans from serving on jury panels, thus ensuring all-white juries.⁵ Evidence suggests this improper use of peremptory strikes still occurs in many jurisdictions.⁶

The Berkeley Law Death Penalty Clinic recently issued an expansive report after investigating seven hundred cases from the California Courts of Appeal that involved objections to prosecutorial peremptory challenges from 2006–2018.⁷ The results of the study were striking, finding that “[i]n nearly 72% of these cases, district attorneys used their strikes to remove Black jurors.”⁸ Those same district attorneys struck white jurors at a rate of only 0.5%.⁹ Prosecutors utilized strikes on Black jurors for a variety of

1. *Challenge* (2), BLACK’S LAW DICTIONARY (11th ed. 2019).

2. See Kayley Viteo, Comment, “*We*” the Jury: *The Problem of Peremptory Strikes As Illustrated by Flowers v. Mississippi*, 52 ST. MARY’S L.J. n.8 (forthcoming 2021) (manuscript at 3) (“[H]istory demonstrates that it is a defendant’s right.” (quoting John J. Francis, *Peremptory Challenges*, Grutter, and *Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 300–02 (2005)).

3. Francis, *supra* note 2, at 303 (indicating Congress enacted a federal law in 1865 permitting prosecutorial peremptory challenges).

4. See Viteo, *supra* note 2, at n.14 (manuscript at 4) (“Historically, prosecutors used challenges to eliminate African American veniremembers, who they theorized were unfit for service and would be sympathetic to black defendants.” (quoting Joshua C. Polster, *From Proving Pretext to Proving Discrimination: The Real Lesson of Miller-El and Snyder*, 81 MISS. L.J. 491, 493 (2012))); cf. Francis, *supra* note 2, at 303–04 (indicating the advent of prosecutorial peremptory challenges may have been “a response to the passage of the Thirteenth Amendment,” which granted African-Americans rights, including the right for Black men to serve on a jury).

5. Francis, *supra* note 2, at 307.

6. Viteo, *supra* note 2, at n.21 (manuscript at 5) (“[T]he more overt variety of racially motivated exclusions . . . remain common.” (quoting Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1627 (2018))).

7. ELISABETH SEMEL, DEATH PENALTY CLINIC, BERKELEY LAW, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS vi (2020).

8. *Id.*

9. *Id.*

reasons, including that jurors “had dreadlocks, were slouching, wore a short skirt and ‘blinged out’ sandals” or simply because they lived in certain urban areas.¹⁰ These results, which show systemic discrimination, are not restricted to California; one may view the report as merely an example of the “abysmal record in *Batson* cases” across the United States.¹¹ As there continue to be instances of police brutality against Black men, women, and children and these cases (hopefully) make it to trial, support for the Black Lives Matter (“BLM”) movement and police reform will undoubtedly become an issue in *voir dire*.¹²

This paper will explore the concept of the ethical prosecutor as it relates to the peremptory challenge and the tendency of this prosecutorial tool to further racial injustice. This paper is intended to be read as a companion, follow-up piece to my Comment, “*We” the Jury: The Problem of Peremptory Strikes As Illustrated by Flowers v. Mississippi*, with a more significant focus on how the peremptory challenge and the concept of an ethical lawyer intersect. In evaluating the prosecutor’s role, I will discuss what it means to be an ethical prosecutor and whether a prosecutor can ever be truly ethical in exercising peremptory strikes—even with good intention. The *Batson* framework creates a paradoxical approach to peremptory strikes, relying on individuals to self-regulate their own biases based on the erroneous presumptions that counsel can not only identify her own biases but also studiously reject engaging with said biases.¹³

The predominance of white prosecutors and judges creates a feedback loop of bias—without diverse voices, any attempt at an ethical strike is merely ethics in an echo chamber. This paper will therefore also briefly address the vital role Black jurors and prosecutors play in changing this

10. *Id.*

11. *See id.* at vii (indicating the United States Supreme Court issued decisions between 2003 and 2019 recommending lower courts more strictly enforce *Batson*).

12. *See infra* Part IV and notes 80–82 with accompanying text (providing examples where race and support of the Black Lives Matter movement have become an issue in *voir dire*).

13.

[A]sking lawyers to identify their own implicit biases is “at best uninformative and at worst misleading.” If a lawyer is unaware of how a juror’s race has affected her decision to strike, she will be unable to explain it. Conversely, if she is aware that race informed her decision to strike, she will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased.

Viteo, *supra* note 2, at n.72 (manuscript at 12) (footnote omitted) (quoting Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 32 (2014)).

system, particularly in the face of police brutality and ever-present voices against Black men, women, and children. I will argue that to be an ethical prosecutor, one must engage with the system as it stands; however, given the risk peremptory challenges pose to the system as a whole, counsel should voluntarily waive peremptory strikes.

II. THE PEREMPTORY PARADOX

Since the late 19th century, the history of the peremptory challenge has been one of constant revision and refinement, with the laudable goal of combating racism in jury selection.¹⁴ It would not be until 1986, with *Batson v. Kentucky*,¹⁵ that the Court articulated a theoretically workable solution to discern and eliminate discriminatory peremptory challenges by using a three-step analysis.¹⁶ But the *Batson* analysis, while arguably widening the ability to show whether a violation occurred, created an enforcement nightmare surrounding issues of evidentiary burden and pretextual reasoning.¹⁷ This analysis first requires the defendant to present a *prima facie* case of peremptory discrimination.¹⁸ The burden then shifts to the prosecutor, who must provide race-neutral reasoning for any challenged strike or strikes.¹⁹ Finally, the burden shifts back to the defense, who has the burden of proving intentional discrimination.²⁰ Theoretically, the *Batson* test could work, but the practicalities trap the defendant into proving intentional discrimination, a near-impossible task.²¹ A prosecutor—even one with ill-intent—could simply make up a proper reason or use, consciously or subconsciously, pretextual reasoning to arrive at a seemingly race-neutral

14. See *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (explaining the 1880 decision of *Strander v. West Virginia*, in which the Court decided a Black defendant was denied equal protection under the law when “members of his race [had] been purposefully excluded” from the jury, led to the Court’s “unceasing efforts” to eliminate racial discrimination from procedures used to select a jury).

15. *Batson v. Kentucky*, 476 U.S. 79 (1986).

16. See *id.* at 95–98 (describing the three-pronged analysis used to determine whether a prosecutor has discriminated during jury selection).

17. See Viteo, *supra* note 2, at n.31 (manuscript at 6) (“A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State.” (quoting *Batson*, 476 U.S. at 90)).

18. *Batson*, 476 U.S. at 95–96.

19. *Id.* at 97.

20. *Id.* at 98.

21. See Viteo, *supra* note 2, at n.224 (manuscript at 32) (describing the difficulties defense counsel faces in proving a strike is discriminatory); see also Polster, *supra* note 4, at 548 (“[B]ecause prosecutors have so much flexibility in the nondiscriminatory reasons that they can proffer, it is extremely difficult for defendants to show any given reason is pretextual . . .”).

reason for a strike.²² *Batson's* intermediate step, the requirement that the striking party have race-neutral reasoning for exercising their strike,²³ is superficial in form and function. Not only can counsel easily provide a false or arbitrary reason but the reason provided could—unconsciously or consciously on the part of striking counsel—be “a close proxy for race.”²⁴ More importantly, the Court itself has recognized race may be implied during voir dire: “[T]he implication of race in the prosecutors’ choice of questioning cannot be explained away.”²⁵

The very nature of peremptory strikes invites invidious discrimination. The system is predicated on the use of stereotypes, which are “a virtually inherent aspect of a system of peremptory challenges.”²⁶ The system’s history is rooted in explicit bias—until the mid-twentieth century, peremptories were used to ensure the final jury panels were rich, white men.²⁷ As systemic, explicitly racist laws were struck down, African-Americans were increasingly called to jury service; in return, counsel’s use of peremptory challenges became less obviously rooted in explicit bias,²⁸

22. See Viteo, *supra* note 2, at nn.31, 75, 77 (manuscript at 6, 12–13) (explaining how prosecutors may produce a race-neutral strike with or without the awareness that the strike correlates with race); see also Polster, *supra* note 4, at 494–95 (explaining how prosecutors may “explain their challenges with strategic reasons” and how “defendants generally cannot show [the explanations] are inaccurate”); Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts a “Culture” of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 CHICANO-LATINO L. REV. 97, 117 (2005) (laying out examples of reasoning prosecutors may use that “correlate with race”); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. REV. 155, 179–80 (2005) (arguing discrimination can occur unconsciously due to the—unfortunately—normal process of stereotyping).

23. *Batson*, 476 U.S. at 97.

24. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 175 (1989); see also Viteo, *supra* note 2, at n.21 (manuscript at 5) (“[I]t makes it painfully easy to cloak even the most overt forms of racism through pretextual race-neutral justifications.” (quoting Frampton, *supra* note 6, at 1626–27)).

25. *Miller-El v. Dretke*, 545 U.S. 231, 262–63 (2005).

26. Viteo, *supra* note 2, at n.15 (manuscript at 4) (quoting Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 452 (1996)).

27. Viteo, *supra* note 2, at n.11 (manuscript at 3); cf. Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 982 (1996) (indicating peremptories worked well only for “as long as jury panels were comprised of affluent White men,” but “[a]s jury panels became more diverse . . . the peremptory challenge assumed a new . . . role as an instrument of race and gender discrimination”).

28. It is important to note, however, counsel continue to utilize peremptory challenges based upon explicit biases. Viteo, *supra* note 2, at n.127 (manuscript at 18). As recently as 2016, the Supreme Court, in *Foster v. Chatman*, found the prosecutorial race-neutral reasoning provided for peremptory challenges in Foster’s earlier trial was a mere façade; documents revealed prosecutors highlighted Black

but many remained undoubtedly dependent on their implicit biases.²⁹ It is precisely the nature of implied biases that makes the question of peremptory strikes an ethical one. Cognitive research indicates “that people automatically categorize others upon first contact and that they use the most salient characteristics, such as race and gender, to do so.”³⁰ The Supreme Court recognized not only the problems implicit bias poses but also the fact that it “cannot be explained away” when such bias influences voir dire and peremptory challenges.³¹ A literal reading would beg the question: If bias cannot be explained away in the context of providing race-neutral reasoning for a peremptory challenge, where does that leave the entire peremptory challenge system? In truth, the *Batson* test and its progeny have created complexity where they intended simplicity—is implicit bias the opposite of intentional discrimination, a subset of it, or is it unintentional bias with discriminatory effect? Regardless, can you be an ethical prosecutor if you use peremptory challenges with the understanding that most challenges are predicated on bias?

III. ETHICS IN AN ECHO CHAMBER

The special responsibilities of the prosecutor are, by and large, governed by aspirational standards. The American Bar Association (“ABA”) describes a prosecutor as “an administrator of justice, a zealous advocate, and an officer of the court” who must utilize “sound discretion . . . in the performance of the prosecution function” in order “to seek justice.”³² This concept, however, is unadvisedly vague: it provides for the prosecutorial duty, but there is little to no limitation on prosecutorial power exercised in

jurors, eventually striking them all. Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1139–41 (2017).

29. Viteo, *supra* note 2, at nn.14, 21 (manuscript at 4–5); see also Page, *supra* note 22, at 156 (arguing “the Batson peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection” because even an attorney may not be aware of his or her own implicit biases); cf. Frampton, *supra* note 6, at 1626–27 (“[E]xisting law . . . makes it painfully easy to cloak even the most overt forms of racism through pretextual race-neutral justifications.”).

30. Viteo, *supra* note 2, at n.73 (manuscript at 12) (quoting Myers Morrison, *supra* note 13, at 30). More disturbingly, the same research shows that not only do “people automatically categorize,” but “many Americans show *automatic* preference for white over black.” Myers Morrison, *supra* note 13, at 30–31 (emphasis added).

31. See *Miller-El v. Dretke*, 545 U.S. 231, 263 (2005) (“[T]he implication of race in the prosecutors’ choice of questioning cannot be explained away.”).

32. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2 (AM. BAR ASS’N 2017).

the pursuit of said duty.³³ As a result, there is little to no actual guidance on what it means, practically speaking, to be an ethical prosecutor.

The National District Attorneys Association (“NDAA”) provides more specific guidance on what it means to be an ethical prosecutor, including guidance on prosecutorial duties within the scope of trial.³⁴ Standard 6-2.3 states: “A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law.”³⁵ The commentary further provides that a prosecutor “should be mindful that as a representative of all of the people of his or her jurisdiction, it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group.”³⁶ These guidelines echo the fundamental concept that “discriminatory strikes distort a basic premise of the jury system: the notion that a jury represents the whole community.”³⁷

Because counsel is guided merely by suggestions that provide no concrete information to aid prosecutors seeking to avoid bias of any kind, the question remains: must an attorney, particularly a prosecutor, forego peremptory strikes in order to be ethical? The answer is complex, and confronting it requires an acknowledgment that racism is not cured. It remains in our culture, in our infrastructure, and in our biases. What has changed about racism is the way it is expressed—gone (for the most part) are outwardly racist laws, open use of slurs, and other instances of clearly expressed racism; in contrast, racism hides quietly in policy and practice, allowing persons to claim the problem of racism has been solved because it

33. *See id.* (providing general guidelines for prosecutors). Model Rule 3.8 does dictate what a prosecutor should and should not do in the scope of a criminal case, but this is primarily limited to the specific duties of charging and investigation. *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.8 (AM. BAR ASS'N 2020) (providing guidelines regarding the ethical responsibilities of a prosecutor).

34. *See generally* NAT'L PROSECUTION STANDARDS Part VI: Trial (NAT'L DIST. ATT'YS ASS'N 2009) (providing standards for candor with the court, selection of jurors, relations with the jury, opening statements, presentation of evidence, the examination of witnesses, objections and motions, and arguments to the jury). It is important to note, however, that these guidelines are not binding. *See* NAT'L PROSECUTION STANDARDS Introduction (stating the standards are merely “an aspirational guide to professional conduct in the performance of the prosecutorial function” and should not be used “in determining whether a prosecutor committed error or engaged in improper conduct”).

35. NAT'L PROSECUTION STANDARDS Standard 6-2.3.

36. NAT'L PROSECUTION STANDARDS Standard 6-2 cmt.

37. Gilad Edelman, *Why Is It So Easy for Prosecutors To Strike Black Jurors?*, NEW YORKER (June 5, 2015), <https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors> [<https://perma.cc/5UAF-3FZ7>].

exists as an undercurrent.³⁸ This reality is disturbing, requiring attorneys to both acknowledge racial bias exists in everyone and it exists in themselves. It demands an acknowledgment that humans are fallible and that in a system requiring counsel to lean heavily on stereotypes to make a peremptory strike, we are often burdened by implicit biases. Given the majority of prosecutors are white and male,³⁹ resulting juries are often white and all-male, not a “jury of our peers.”⁴⁰

One must also acknowledge the change in views on peremptory strikes’ utility. Originally intended as a tool to protect the defendant, the strike has become a strategic measure to win trials before they officially begin.⁴¹ This presents two major problems, turning an ethical debate into an ethical quagmire. First, lawyers—across both sides of the aisle—like peremptory challenges.⁴² Defense counsel like them because they can be used to even the scales against prosecutorial power, and prosecutors like them because of their ability to effectively build an insider focus group.⁴³ Second,

38. See Viteo, *supra* note 2, at n.163 (manuscript at 23) (“Racism has shifted over the decades, from overt displays to subtlety, which is arguably now even more pervasive[.]”); see also Francis, *supra* note 2, at 333 (footnote omitted) (“Psychologists believe that racism among whites still exists in modern America, but the manifestation of bias has changed. Overt racism is frowned upon in most white social circles, leaving the expression of racial ideations to occur in more subtle or ‘acceptable’ manners.”).

39. See AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY (2019) [hereinafter LAWYER POPULATION SURVEY] (showing the national population for active attorneys was 64% male and 85% white as of 2019 and that the percentage of active African-American attorneys has hovered at 5% of all active attorneys since 2009); see also Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<https://perma.cc/BLE2-AZ5Y>] (providing a 2014 study that found 95% of elected prosecutors were white); Jamiles Lartey, *White Men Make Up 79% of Elected Prosecutors in US, Study Says*, GUARDIAN (July 7, 2015), <https://www.theguardian.com/law/2015/jul/07/us-elected-prosecutors-white-men-criminal-justice-system> [<https://perma.cc/3AJ5-QT55>] (stating the 2014 study found “60% of states have no elected black prosecutors”).

40. See Frampton, *supra* note 6, at 1607 (indicating peremptory challenges often exclude nonwhite jurors, placing white jurors on the jury in their stead); see also Page, *supra* note 22, at 156 (indicating gender, along with race, is a factor that may influence the exercise of a peremptory challenge).

41. See Myers Morrison, *supra* note 13, at 5 (“Many litigators view peremptory challenges as essential tools for sculpting a jury that will give them and their clients the most favorable audience.”).

42. Viteo, *supra* note 2, at n.214 (manuscript at 30); Myers Morrison, *supra* note 13, at 5.

43. Cf. Myers Morrison, *supra* note 13, at 5 (indicating litigants like peremptory challenges because the challenges allow them to sculpt a jury they assume will find facts in favor of their clients); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 394–95 (2010) (“Although the legitimate purpose of voir dire is to

particularly for prosecutors, this tool may be seen as integral to the overall duty to seek justice.⁴⁴ Theoretically, this use of peremptory strikes is laudable where prosecutors using the strikes strive to meet a duty that some would argue is vague and insurmountable; however, the problem is in application. Where is the line showing prosecutors where use of the tool becomes unethical? Is a prosecutor still an ethical prosecutor if she utilized the strike inappropriately but did so because she believed it would lead to justice in a particular case?

The only standard formally guiding the behavior of counsel in use of peremptory strikes is the *Batson* line of cases.⁴⁵ But even that constitutional command—race should have no place in the courtroom—is, in practice, aspirational.⁴⁶ Proponents of the peremptory challenge tout the *Batson* decision's "positive power," which "enforces a normative framework of legal ethics . . . [b]y fostering a nondiscrimination norm as part of the norm of professionalization."⁴⁷ In theory, this perspective means counsel and judges alike are, by and large, ethical self-regulators, with *Batson* as the "enforcement mechanism."⁴⁸ This theory is willfully ignorant of the unconscious ways in which bias works and presumes an individual understands a certain bias may, in fact, be incorrect or misguided. It relies on a "shared trust between the prosecutor, defense counsel, and judge," but

obtain information from prospective jurors . . . many lawyers instead use their allotted time to try to educate or indoctrinate the jury with respect to the themes and theories of their case.").

44. See Laura I. Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces A Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 608, 610, 624 (2005) (arguing the Batson rule encourages ethical behavior from all participants of the judicial system and acts "as a means of enforcement and attorney discipline" in their pursuit of justice); see also Myers Morrison, *supra* note 13, at 5 (indicating "there is an intrinsic value to the peremptory challenge," in that it provides litigants with the autonomy to determine who the factfinders will be in a trial without interference from the courts).

45. These cases include: *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Rice v. Collins*, 546 U.S. 333 (2006); *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Purkett v. Elem*, 514 U.S. 765 (1995); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Hernandez v. New York*, 500 U.S. 352 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

46. See Appleman, *supra* note 44, at 608 (stating *Batson* "construct[s] and compel[s] an aspirational code of ethics").

47. *Id.*

48. See *id.* at 611–12 ("The lawyer or judge engaging with the *Batson* doctrine—which occurs in each and every jury selection—takes 'personal moral responsibility for the consequences of their professional acts,' which facilitates ethical lawyering.").

neglects the reality that this shared trust is predicated on an overwhelmingly white, male perspective, which often shares certain biases—this presents very real problems to collective enforcement.⁴⁹ This is not ethics in practice, it is ethics in an echo chamber.

IV. BLACK JURORS AND PROSECUTORS MATTER

Peremptory challenges have risen as a subject of debate with each successive *Batson* decision, which produced no real change in the system or its inherent injustice toward people of color—particularly Black men and women.⁵⁰ Even more recently, the spotlight on racial justice and police brutality has raised this debate once again.⁵¹ The killing of George Floyd by a police officer, who knelt on Floyd’s neck for more than a minute even after he became unresponsive, incited worldwide protests against police brutality and for police reform, leading to larger questions about racial justice and what it means to be a Black person in a system that inherently works against them.⁵² For those who are Black, Indigenous, People of

49. See Viteo, *supra* note 2, at n.166 (manuscript at 23–24) (arguing the lack of diversity on juries results in same-group bias, which in turn allows informational cherry-picking which works against the outsider). This same concept of same-group bias applies to the majority white legal profession. See also *supra* note 39–40 and accompanying text (referencing reports on the racial makeup of the legal profession, which indicate prosecutors are predominantly white and male).

50. The author, a white woman, writes this from a place of privilege. Many people of color have written poignantly about this experience and continue to advocate for jury reform. Some of these men and women have been cited herein, and additional vital readings and resources are provided below. See generally THE JUROR PROJECT (2017), <http://www.thejurorproject.org/> [<https://perma.cc/VR8L-LYGQ>] (“Juries play a critical role in our justice system, but too often they lack diversity. We’re working to change that.”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 151 (2010) (“... the systematic exclusion of black jurors continues largely unabated through use of the peremptory strike”); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 12 (2017) (“From felon disenfranchisement laws that suppress black votes, . . . to win-at-all-costs prosecutors who strike blacks from jury pools, . . . it is impossible to understand American crime policy without appreciating racism’s enduring role.”); IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 501 (2016) (“[W]hen Black people leave those jails that are crowded with Black and Brown people, the slavery ends only so new forms of legal discrimination can begin.”); CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 3 (2016) (“White rage is not about visible violence, but rather it works its way through the courts, the legislatures, and a range of government bureaucracies.”).

51. See *infra* notes 81–82 and accompanying text (describing current issues regarding peremptory strikes as related to potential jurors’ support for the Black Lives Matter movement).

52. See Meredith Deliso, *Timeline: The Impact of George Floyd’s Death in Minneapolis and Beyond*, ABC NEWS (June 10, 2020, 2:27 PM), <https://abcnews.go.com/US/timeline-impact-george-floyds-death-minneapolis/story?id=70999322> [<https://perma.cc/XQ74-C8PW>] (laying out a timeline of events and descriptions of demonstrations responding to the death of George Floyd); see also *George Floyd: What*

Color (“BIPOC”), the thought that our nation provides “justice for all” is a façade at best; at worst, it is an outright lie. As the list of BIPOC persons killed by police grows ever longer and protests—live on television—show a visceral, brutal, outsized response by police, the outcry of “Black Lives Matter” has never mattered more.⁵³

Seeking justice in response to police brutality starts with diversifying the makeup of the jury box.⁵⁴ Currently, the makeup of juries does not typically represent a true jury of our peers,⁵⁵ the melting pot Americans are so proud of only in the abstract. Take, for example, a Black public defender’s experience in New Orleans, Louisiana:

When the jury walked in the room, one question that immediately came to my mind was, “Well, where are the black folks?” New Orleans is about 60% black, but we didn’t have that representation for people that were walking into the courtroom to potentially serve on the jury for this case. It was frustrating to me. The only representation of people of color in the courtroom are unfortunately the majority of the people who are being charged with crimes, and we aren’t getting a fair representation on the jury panels.⁵⁶

Happened in the Final Moments of His Life, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/E2U2-WKSZ>] (describing the circumstances of George Floyd’s death).

53. The Black Lives Matter (“BLM”) movement is not a recent development, but a concentrated effort that began in 2013 after Trayvon Martin’s killer was acquitted with a goal to create “a world free of anti-Blackness, where every Black person has the social, economic, and political power to thrive.” *What We Believe*, BLACK LIVES MATTER, <https://blacklivesmatter.com/what-we-believe/> [<https://web.archive.org/web/20200819225500/https://blacklivesmatter.com/what-we-believe/>]; see also *About Black Lives Matter*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://web.archive.org/web/20201209075906/https://blacklivesmatter.com/about/>] (providing information regarding the foundation of the Black Lives Matter movement).

54. Jeannie O’Sullivan, *Will Spotlight on Racial Justice Force More Diverse Juries?*, LAW360 (June 28, 2020, 10:02 PM), <https://www.law360.com/articles/1287048> [<https://perma.cc/CU4U-H8BT>] (“It is important to include the conversation of jury duty amongst the current discourse as a reminder that the jury box is where we, the people, decide who we believe should be convicted and likely sent to prison, and who should not.”).

55. Viteo, *supra* note 2, at n.181 (manuscript at 25) (“[A]cross American jury boxes today there are thousands of missing nonwhite jurors. Instead, these seats are filled by white jurors that, absent systemic racial exclusion, a nonwhite juror would be occupying.” (quoting Frampton, *supra* note 6, at 1620)).

56. Christina Blacken, *Crack Rocks and Santa Claus: A Conversation on the Fallacy of Stereotypes and the Importance of Jury Duty*, THE NEW QUO (Dec. 14, 2016), <https://www.thenewquo.com/magazine/2016/12/14/crack-rocks-and-santa-claus-a-conversation-on-the-fallacy-of-stereotypes-and-the-importance-of-jury-duty> [<https://perma.cc/BQ7N-HHF5>].

This lack of fair representation critically undermines any significant strides in racial justice.

The defendants in the George Floyd trial requested to move the case to another venue; defense counsel reiterated the motion to change venue on September 11, citing harassment and threats.⁵⁷ Thankfully, the judge denied this motion.⁵⁸ The judge had previously threatened to move the trial out of Minneapolis—specifically Hennepin County—if officials did not stop talking about the case, though he did not issue a gag order.⁵⁹ Without taking into account the racial makeup of Hennepin and the surrounding counties of Minneapolis, the foregone threat of a change of venue may not have seemed significant; however, Hennepin County’s population is 13.6% African-American, where “[o]nly one other county in Minnesota is even over 10% African American population, and 47 counties are below 1%.”⁶⁰ A change of venue to any other county would have practically ensured the amount of African-Americans pulled for jury service would be very low, and the ensuing procedures (including challenges for cause and peremptories) would likely eliminate them from the jury panel entirely.⁶¹ The trial is currently set for March 8, 2021.⁶²

An all-white jury would have been a travesty in such a case. Diverse juries are critical to fair representation and, thus, a fair trial.⁶³ Racial identity provides a different experience and perspective, affecting how jurors view certain items of evidence, witness credibility, and more—especially when

57. *George Floyd Judge Warns He May Move Trials If Officials Keep Talking About Case*, GUARDIAN (June 29, 2020, 6:20 PM), <https://www.theguardian.com/us-news/2020/jun/29/george-floyd-judge-warns-he-may-move-trials> [https://perma.cc/AE4C-NY8R].

58. Jaclyn Diaz, *Judge in George Floyd Case Rejects Former Cops’ Request to Move Trial*, NPR (Nov. 5, 2020, 5:04 PM), <https://www.npr.org/2020/11/05/931742397/judge-in-george-floyd-case-rejects-former-cops-request-to-move-trial> [https://perma.cc/K2K6-FV9Y].

59. *George Floyd Judge Warns He May Move Trials If Officials Keep Talking About Case*, *supra* note 57.

60. Elie Honig, *Where the George Floyd Case Must Be Tried*, CNN (June 8, 2020, 8:46 PM), <https://www.cnn.com/2020/06/08/opinions/where-the-george-floyd-case-must-be-tried-honig/index.html> [https://perma.cc/R54Z-5P59].

61. See Francis, *supra* note 2, at 298–99 (“[D]emographic realities place minority defendants at a greater disadvantage than other litigants . . .”); see also Frampton, *supra* note 6, at 1627 (indicating racially discriminatory procedures are still commonly used to strike Black potential jurors).

62. *Lawyer: Unruly Crowd Warrants Venue Change in George Floyd Case*, CBS MINN. (Oct. 1, 2020, 6:06 PM) (on file with author), <https://minnesota.cbslocal.com/2020/10/01/lawyer-unruly-crowd-warrants-venue-change-in-george-floyd-case/> [https://perma.cc/AX87-484U].

63. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U.L. REV. 777, 798 (1994) (“To the extent that persons of color can contribute points of view that may not be readily apparent to majority jurors, the deliberative process may be substantially fairer and wiser.”).

race is an issue at trial or the defendant is a person of color.⁶⁴ An all-white, or even majority white, jury panel thus presents a significant challenge to racial justice. A diverse jury, or a jury with even just one Black person, can dramatically change results in a trial; the jury “can address things like implicit biases, can address things like racial anxiety. More questions will be raised. You’re gonna have longer deliberations and will get a more objective decision that will be made.”⁶⁵ An all-white jury is very likely not going to have a conversation about these topics, nor is it likely it will openly acknowledge the systemic forces which work against Black Americans.⁶⁶ Moreover, a more diverse jury is “going to lead to quality deliberation and a more fair system.”⁶⁷ Even a jury panel with one African-American may find it difficult to raise these issues simply because the majority can drown that voice out with the common (and predominantly white) refrain: “It isn’t a race issue.”⁶⁸ But it is—correcting racial injustice touches every fiber in the fabric of our nation, including discriminatory jury selection.⁶⁹

Though the Black juror is the focus of this article because of Black jurors’ direct connection to and experience with the peremptory challenge, it is also vital to note the importance of Black prosecutors. Prosecutors hold near-

64. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1037–38 (2003).

65. Blacken, *supra* note 56.

66. See Ellis & Diamond, *supra* note 64, at 1037–38 (indicating all-white juries lack the perspectives and experiences to fairly assess facts and evidence in cases where race is a salient feature).

67. Blacken, *supra* note 56. It is essential to correct jury selection injustice, but it is also important to reach an accurate verdict in cases where race is an issue. Diversity advances toward, rather than detracts from, that end. *Id.*

68. Studies have shown that when a trial is racially charged, white jurors are “concern[ed] about avoiding prejudice or the appearance thereof. However, absent racially charged trial content, when they are presumably less concerned about racism, White jurors are harsher in their judgments of a Black than a White defendant.” Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 599–600 (2006). Moreover, these studies have also shown that all-white juries’ deliberations were shorter and more prone to errors. *Id.* at 605. Other studies have also shown that the presence of Black jurors on the panel has drastic effects, particularly in the context of the death penalty. With zero present—an all-white jury—there is a 72% likelihood of a death sentence; however, with one to two Black male jurors, the likelihood drops to 43% and 36%, respectively. Vox, *The Big Problem with How We Pick Juries*, YOUTUBE (Oct. 12, 2018), https://youtu.be/cPRK_ABldIk [<https://perma.cc/2L7R-DQYP>].

69. See Viteo, *supra* note 2, at n.215 (manuscript at 30) (“Recent scholarship illustrates how the legacies of Jim Crow infect and permeate contemporary criminal justice—from surveillance and policing to mass incarceration and execution. . . . But the enduring role of racial exclusion in jury selection—and the stark, outcome-determinative impact of this exclusion—remains undercontextualized and inadequately documented.” (quoting Frampton, *supra* note 6, at 1595–96)).

unchecked power in the judicial system, arguably more than a police officer or even a judge.⁷⁰ Prosecutors decide to bring charges and what specific charges to bring.⁷¹ Critically, as of 2019, African-Americans make up a mere 5% of the national lawyer population overall;⁷² additionally, a 2014 study showed persons of color hold a mere 5% of prosecutor positions across federal and county levels.⁷³ A separate report from 2019 shows this number has not changed.⁷⁴

Black prosecutors are important not only because of their charging decisions—particularly because they may, appropriately, be more aggressive in charging police officers who brutalize or kill Black Americans—but also because issues surrounding peremptory challenges are uniquely prosecutorial problems.⁷⁵ Given the vast majority of prosecutors are white, they are also uniquely white prosecutor problems. Just as diverse jurors may acknowledge implicit bias or systemic inequalities, so may the Black prosecutor.⁷⁶ A Black prosecutor is more likely to have intimate knowledge of systemic bias and will understand their use (or non-use) of peremptory challenges will encourage a change in the racial demographics of jury

70. See Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [https://perma.cc/4MF8-NU5C] (“Most cases are resolved through plea bargains, where prosecutors, not judges, negotiate whether and for how long a defendant goes to prison.”).

71. *Id.*

72. This number has held steady for ten years. LAWYER POPULATION SURVEY, *supra* note 39.

73. REFLECTIVE DEMOCRACY CAMPAIGN, WOMEN DONORS NETWORK, JUSTICE FOR ALL? at 1 (2014), <https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf> [https://perma.cc/93HR-BG4D].

74. REFLECTIVE DEMOCRACY CAMPAIGN, WOMEN DONORS NETWORK, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS’ CLUB OF ELECTED PROSECUTORS 1 (2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> [https://perma.cc/699W-DNRD].

75. See Brando Simeo Starkey, *Prosecutors, Not Just Police, Can Also Play a Part in the Abuse of Black Lives*, UNDEFEATED (Sep. 20, 2017), <https://theundefeated.com/features/prosecutors-not-just-police-can-also-play-a-part-in-the-abuse-of-black-lives/> [https://perma.cc/D7CL-ECNX] (“With considerable authority in the legal system, many prosecutors have the ability to trample upon the constitutional rights of black criminal defendants. This malfeasance can reveal itself in a variety of ways, but one is when prosecutors deliberately make juries as white as possible.”).

76. See Melba Pearson, *My Life As a Black Prosecutor*, THE MARSHALL PROJECT (July 21, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/07/21/my-life-as-a-black-prosecutor> [https://perma.cc/Z2XE-Z5Y9] (“This is why diversity is important. Just like police officers should resemble the neighborhoods they patrol, it’s critical that decision makers in the criminal justice system reflect the populations they serve.”).

panels.⁷⁷ An increase in Black prosecutors “is the key to making progress on two of the biggest issues in criminal justice: shrinking the American prison population and holding police officers who use improper deadly force against unarmed black people accountable for their actions.”⁷⁸

V. CONCLUSION

Peremptory challenges hold a unique place in criminal justice, and it is no easy feat to advocate their abolishment⁷⁹ or that prosecutors must abstain from the system entirely if given no other choice. Simply being Black has led to peremptory strikes of Black potential jurors based on long-held (and entirely unproven) stereotypes stating Black jurors are unable or unwilling to convict Black defendants.⁸⁰ Now, as support for Black Lives Matter has risen to unprecedented levels, we are beginning to see cases where that support may be cause for a strike under the guise of an inability to “be impartial toward law enforcement.”⁸¹ A Minneapolis court upheld a conviction in 2016 even after a prosecutor asked direct BLM-focused questions during voir dire, finding “there were no racial overtones,” and a California appeals court will decide if striking a Black woman, Crishala Reed,

77. Just as with Black jurors, Black prosecutors add a diversity of thought, experience, and perspective, which is essential to criminal justice reform. Melba Pearson, who served in Miami-Dade County as the Assistant State Attorney for fifteen years, advocates for Black law students to see the power of advocacy in the prosecutorial role as opposed to the power of an oppressor. Specifically, her argument “is that African-American prosecutors, based on their life experiences, may approach a case differently. They may be willing to give them a second chance if they deserve it. . . . They may be aware of certain nuances . . . or certain cultural norms that other prosecutors may not be aware of.” Leon Neyfakh, *Why Aren't There More Black Prosecutors?*, SLATE (July 8, 2015, 5:16 PM), <https://slate.com/news-and-politics/2015/07/prosecutors-and-race-why-arent-there-more-black-prosecutors.html> [<https://perma.cc/P4RU-Z7LJ>]; *Meet Melba*, MELBA PEARSON FOR MIAMI-DADE STATE ATTORNEY, <https://melbaformiami.com/> [<https://perma.cc/BL92-AUMW>].

78. Neyfakh, *supra* note 77.

79. See Viteo, *supra* note 2, at n.263 (manuscript at 38) (emphasis in original) (“We must therefore move forward with a system that produces juries of ‘peers’ by random selection, representing the diverse experiences and lives of the criminal defendants in the nation’s courts, with the shared goal of a truly fair trial for all.”).

80. See Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL’Y 57, 57–58 (1997) (explaining “the myth of black juror nullification” that arose in response to African-American participation on juries “is a racist attack on the jury system motivated in part by a desire to limit the impact of ‘minority’ peoples’ experiences on the justice system.”).

81. Abbie VanSickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter*, THE MARSHALL PROJECT (July 7, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/07/07/you-can-get-kicked-out-of-a-jury-pool-for-supporting-black-lives-matter> [<https://perma.cc/ZN59-6NNU>].

from a jury for writing “I support Black Lives Matter” on her questionnaire was legal.⁸² These are just two cases that have reached the appellate level, which means more cases with similar issues likely exist; with the rise in support for Black Lives Matter after the killing of George Floyd, there will undoubtedly be more.

This is a system that, clearly, will not fix itself. Since the mid-nineteenth century, the Supreme Court has struggled with the concept of the peremptory challenge, creating and changing systems to analyze whether a strike was discriminatory, with nothing to show for it.⁸³ Black jurors are still challenged at a much higher rate than their white counterparts,⁸⁴ but this type of discrimination is not unique to southern, typically more conservative states.⁸⁵ To participate in this system such as it is—to use peremptory challenges even with good intention—perpetuates a system systematically devaluing Black lives and the Black perspective.

82. Unbelievably, the question asked in the 2016 case was: “Have you participated in any of the Black Lives Matter kind of marches and stuff like that here?” *Id.* Though the judge determined her support for Black Lives Matter was an insufficient reason for removal, the prosecutor specifically used a peremptory challenge to strike her from the panel. More astonishingly, even “[b]efore interviewing Reed, prosecutors had already used peremptory challenges to remove six other persons of color from serving on the jury in the case.” Andrew Karpan, *When Can A Juror Say Black Lives Matter?*, LAW360 (Aug. 9, 2020, 8:02 PM), <https://www.law360.com/articles/1299398> [<https://perma.cc/UQ36-3GA7>].

83. See Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1946 (2015) (“The current *Batson* rule constitutes a placebo [and] . . . represents the culmination of the Supreme Court’s desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it.”).

84. In *Miller-El I*, potential African-American jurors were challenged at a rate of 90.9% versus non-African-American jurors who were challenged at a rate of 12.9%, making African-American jurors “7 times more likely to be removed by the prosecutor than a non-African-American.” Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination: Application to Foster v. Chatman*, 69 VAND. L. REV. EN BANC 51, 65–66 (2016); see also Viteo, *supra* note 2, at nn.107, 193 (manuscript at 16, 27) (exemplifying how several studies have shown the rates at which African-American prospective jurors are struck far exceeds the rate at which white prospective jurors are struck); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C.L. REV. 1957, 1963–64 (2016) (presenting a study finding “prosecutors struck black jurors at 2.48 times the rate they struck all other jurors”).

85. Jim Craig, a jury discrimination specialist and director of the “Roderick and Solange MacArthur Justice Center” in Louisiana, filed a brief supporting Curtis Flowers during his appeal. A quote from that brief: “That these same techniques of racial discrimination and trying to whitewash discrimination are not just a part of Southern trials, but are a part of some of the most progressive parts of the United States, is exceptionally troubling.” VanSickle, *supra* note 81.

In using a tool so intrinsically connected to bias,⁸⁶ how can there be certainty that any single challenge, much less their collective use, is fair? The guiding standards, including those proscribed by *Batson*, are solely aspirational and vague at best.⁸⁷ Individual ethical standards influence any ethical prosecutor's actions—as fallible and prone to under- or overreaching as any moral standard. Charged with an ethical duty above and beyond representing a single client—to seek justice—prosecutors should voluntarily refrain from using a tool that has been proven to result in partial juries.⁸⁸ Until there has been more practical, widespread reform,⁸⁹ which must include “[b]usting th[e] monopoly” of white lawyers,⁹⁰ entirely abstaining from the system is the surest course to protect the fundamental right to a fair trial.

86. And a *particular type* of bias. See *supra* note 30 (explaining how many people initially categorize others based on their “salient characteristics”).

87. See *supra* note 46 and accompanying text (explaining *Batson*'s constitutional standard is largely aspirational).

88. See Howard, *supra* note 43, at 372 (“Prosecutors should voluntarily abstain from using tools that are legal but risk seating a biased jury and denying individuals of a certain class, race, or gender the right to serve on juries.”).

89. In lieu of states voluntarily abstaining, it is imperative states track how strikes are utilized so racial-correlations may be publicly visible. See Edelman, *supra* note 37 (“[T]he most powerful, realistic reform would be to have states track the racial makeup of jury selection in the same way they track the racial statistics of traffic stops.”).

90. Neyfakh, *supra* note 77.